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In Memoriam

The Copernican Revolution in Jurisprudence: In Loving Memory of Rudolf B. Schlesinger, Mentor and Friend

By UGO MATTEI*

I. Personal Memories

Rudi was eighty-eight years old when he passed away. When a person you love is that old it is quite natural to contemplate the day when they will no longer be around. Every now and then I would think about Rudi passing away, but the thought would never last for more than a few seconds. Perhaps the thought of losing him was so horrible that I wouldn't let myself contemplate it for more than a moment. Besides, Rudi was so alive and full of spirit that death seemed to be a distant thing. I could hardly imagine living in the Bay Area without him around. It was commonplace for me to call him at any-time to discuss my work or my personal concerns. He would always make time to meet with me and I could always count on him for advice, encouragement, and help. Many times he would share a professional life-lesson with me and always add a lovely twist. When I visited him last August, right after returning from my spring teaching in Europe, he opened the door, and with a sweet smile said to me: "Once again, I realize that you are not the greatest correspondent."

It was Rudi who drew me to the Bay Area for the first time in 1987. As a Fulbright scholar, I could choose where to complete my LL.M. The choices included a number of prestigious American academic institutions, including a number of Ivy League schools in the East. Unaware of its beauty, I chose the Bay Area so that I could

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study with a legend among European comparativists—the “Great Schlesinger of the Cornell Seminars,” as he was called by my undergraduate professors.

I remember when I walked into his office for the first time and introduced myself. As a student at Boalt, I needed special permission to take his course for credit at Hastings. In American comparative law classes, it is typical to have enrollment of less than a dozen students, but his class was packed. There were more than 120 students enrolled and a wait list comprised of more than 30 additional students. The “Great Schlesinger” smiled and said to me, “Well I guess that as a civil law immigrant lawyer you need a special pass . . . here, read this first.” He handed me a thick book on American Civil Procedure. The book was co-authored by a well-known Dean of a prestigious West Coast law school named Mary Kay Kane. With a grin he said, “to make a comparison, you always need a point of observation.” That was the first lesson that Rudi taught me, but it would certainly not be the last.

In retrospect, that first lesson showed a few of the most characteristic aspects of his personality both as a man and a scholar. His methodological and epistemological awareness, his passion for U.S. law and the United States as a country, and his pride of being a European immigrant could all be gathered from his very first words to me that day. When my daughter Clara was born later in the semester he always referred to her as “your little American.”

My friendship with Rudi was intensely unique. He was a man more than fifty years my senior and a person who was considered to be a legend in comparative law. The remarkable thing to me was that this legend was also my friend. That is one reason why the thought of losing him frightened me. This fear was always mitigated whenever I had a chance to see him. He had an incredible vitality about him. Even in the terrible months of Prutti’s illness, he showed tremendous energy. Rudi was there for her around the clock. There was no doubt that that this woman was the love of his life. In August, when Prutti was hospitalized, Rudi told me with a bitter smile that “fortune had finally reversed itself.”

His mind as well as his heart was something absolutely exceptional. Sometimes I think about him and recall the wonderful memories of Rudi and Prutti together. They would invite my wife and me out to a fancy restaurant where Rudi was an habitu . Everyone knew him there and he would magically energize the room. They would lovingly refer to him as “the Professor”. These times were beautiful

times for my wife and me. We would go home after an evening with Rudi and Prutti, confident that love in your eighties could be as passionate and as fresh as love in your teens. The two of them exuded their very special energy and this energy was a beautiful thing to experience.

II. An Active Comparativist Until The Very Last Minute

In the last months before Rudi passed away, I was trying to serve as an intermediary between Rudi and the comparative law community that he loved so much. Rudi could not leave his position beside his beloved Prutti and together they fought an impossible battle. Ironically, at a time when Rudi was immersed in this desperate battle, there were many exciting things going on in comparative law both in Europe and the United States. Rudi desperately wanted to keep informed so I would visit him after each conference and he would sit and listen eagerly as I told about the latest development in comparative law. He wanted to know and share all of the new ideas that were circulating. And in the midst of his personal crisis he remained optimistic about the future of our discipline.

I saw him at his place less than a month before his death. Professor Kotz, another lifelong admirer of Rudi, had visited my comparative law class at Hastings. After the lecture, the two of us went to see Rudi at his home. We spent a couple of hours there, discussing comparative legal education. As usual, Rudi was lively, passionate, and incredibly lucid, but he could not hide the veil of sadness that covered his heart.

Rudi still had his sights on the future. In October, he told me about his intention to recommend me for his position as an editor of the *American Journal of Comparative Law*. I was flattered but I resisted for the sake of protecting the prestige of the Journal. Rudi exclaimed, "Maybe I should stay for a few more years!" He was anxious about the sixth edition of his comparative law text book and he used me as an ambassador to encourage and stimulate his co-authors to finish so he could publish the updated enterprise. It was always a hasty battle against time in a world of unprecedented legal acceleration. Ten days before he passed away we discussed who would have been a good appointment for the new Stiefel Chair of Comparative Law in New York. Later on the phone he openly complained about the Italian proclivity to delay. He wanted to know which issue of the

Rivista di Diritto Civile would contain an article written by him in 1964.

When I arrived at Hastings on the Monday after his death I had no idea that he had passed away. I had just received the last version of the Italian translation and I was planning to bring it to him that very afternoon. I was excited at the thought of spending some time with him. Instead, I found a note from the Dean that told me that Rudi had passed away. I stood and read the note again and again and I began to feel desperately alone. I began to experience the heaviness of my loss. Not just the loss of his legal scholarship and instruction, but the loss of a friend who was a beautiful human being.

It will be impossible to replace Rudi in our community of comparative lawyers. I will always remember the day Professor Buxbaum presented him with his Festschrift issue in the *American Journal of Comparative Law* at Hastings. It was nearly a year before his death and it will always be one of the most beautiful days of my scholarly life. In that issue, there is not only a complete list of Rudi's work, but also an exceptionally lucid piece written by him. At the time, it was his research program and now can be seen as his intellectual testament. Entitled *The Past and The Future of Comparative Law*,¹ this piece was his acceptance speech for the Honoris Causa Degree at the University of Trento in Italy. It is perhaps the most stimulating and informative piece ever written on the field of comparative law. In fact, this work should be mandatory reading for anyone interested in our discipline whether a first year law student or an accomplished professional (perhaps even more for the latter).

III. Schlesinger's Copernical Revolution

Obviously Rudi was a towering figure in the field of comparative law. His contribution to the discipline does not need attention here. It is more important to remind readers of his legacy and the responsibility that comes from it: his work has given comparativists the tools to contribute to jurisprudence in general. A contribution that, if not wasted by the inadequacy of the younger generation, will make comparative law scholarship a true front-runner in the new millennium. Such a legacy could lead to a Copernican revolution in jurisprudence: the sense that law and legal problems do not finish at the boundaries of one particular State. In other words, the State is not at the center

1. 43 AM. J. COMP. L. 477 (1995).

of the legal universe but rather it is just one of the many planets of the legal system.

Rudolf Schlesinger's contribution went well beyond comparative law and pierced deep into the domain of jurisprudence. He was able to show us that like in Anthropology, Economics, Political Science, Sociology, and Linguistics, legal scholarship should proceed first by comparative analysis of models. Once we have understood the nature of a legal problem, only then may we be concerned with the peculiarities of each national legal system. Such peculiarities may very well affect the solution of a problem at the local level, but if we focus first on the parochial contingencies of the problem we will necessarily fall in an exceedingly formalistic positivism. Comparative scholarship is the only approach that allows us to distinguish what is contingent from what is structural in the law.

Rudi was neither a civil law lawyer nor a common law lawyer. He was both. Unlike many of the other great civil law immigrants in the common law world such as Kelsen, Rabels, Katorowicz, and Borchard, Rudi came to this country young enough to successfully master an additional legal education. He accomplished this by becoming the only non-native speaker ever to be Editor In Chief of the Columbia Law Review. Rudi was perfectly bi-legal, an aspect that he shares with some of the other academic giants of this century such as Rheinstein and Riesenfeld, and this helped legitimize him in his scholarship. It allowed him to criticize U.S. law in a way that was intellectually honest.

By looking at American law in a comparative perspective Rudi could see how much legal positivism and a narrow pre-Copernican conception of the law as a political product of the State had affected American legal realism. This narrow view made American Legal Realism ultimately and paradoxically a formalistic approach to the law. Looking at the law in terms of judicial conduct is not drastically different from considering appellate opinions as the laboratory materials of the legal science. A real Copernican revolution does not occur until case law is reduced to what in fact it is: just one of the contingent components (perhaps the American favorite) of the law, which is itself a much more complex phenomenon. From Schlesinger's global comparative perspective, both formalism and realism are reductionist jurisprudential approaches that fall well short of helping us understand what truly is the law.

Rudi used U.S. Legal Realism to uncover what really matters in the law. He refused the narrow Realist notion which proclaimed that

ultimately all that matters are cases and the official decision making process. Rudi maintained that the law is conditioned by a much broader variety of factors including the unofficial (not only legal scholarship, but culture in general) and unconscious variables which are as important as the official and the conscious.

Just to attempt to list of the cultural, political, psychological, linguistic, and economic factors that play a part in the law requires a tremendous amount of knowledge, a quantity that very few scholars in the world can ever hope to possess and control. This is why the intellectual capital that has been lost with Rudi's passing can, without exaggeration, be considered a devastating loss to the field.

From the global perspective of a true and complete intellectual, Rudi was able to capture truth. His approach mixed proverbial ironies with humor in a never ending conflict between realism and formalism. A conflict that often assumes tones as if it could determine the fate of law, society, and mankind. He loved to refer to academic controversies with the same phrase that he used whenever I resisted (without ever succeeding) to his paying the check at a restaurant: "The battle is so hard because the stake is so little." He would often say this while examining the extreme positions of some of modern U.S. jurisprudential approaches.

He was not arrogantly disinterested but only condescending towards the dogmatic abstractions of certain neo-formalist approaches of some brand of law and economics, or towards certain naive attempts to trash the difference between law and politics, as is done in certain critical theories. Rudi was interested in whatever was new in the law. But his conception of the law was a very Kaleidoscopic enterprise, fundamentally path-dependent, and impossible to change by just another enactment or another decision (even of the Supreme Court). His conception of the law was too well-motivated in authentic cosmopolitan learning to be impressed by fundamentally parochial and contingent disputes. It is very difficult to ever find something new in the law if your perspective is as broad and as far reaching as Rudi's. Everything has already happened or has already been said by someone somewhere in the world.

This of course does not mean that it is not worth trying to improve both our practical and our theoretical learning by carefully selecting between the immense estate of world's legal learning. What Rudi really couldn't stand were what he called the two capital sins of legal scholarship: (a) The constant re-invention of the wheel, namely the pre-Copernican jurisprudential debate both in Europe and in the

United States; and, (b) the professional discussion, so common among comparativists, about how to do things rather than just doing them.

IV. Conclusion

There is a popular saying in Northern Italy that Rudi loved and that is used when you want to describe the extent to which someone lies: "He lies like an obituary." I kept this saying in my mind while writing this article and imagined what Rudi would have said after he finished reading it. In Rudi's case this saying, usually accurate, is falsified. It would be impossible to lie by overstressing his importance and greatness. Rudi was an amazing combination of heart and intellect. This combination conferred in him the charisma and the leadership that are necessary for long lasting accomplishments in legal scholarship today.

His intellectual curiosity, which was apparent until his very last breath, was absolutely incredible. The variety of his interests was apparent just by looking at the scholarly books that he kept at his home. They included Confucius, Adam Smith, Lord Keynes, and Malinowski, as well as a large collection of dictionaries in every possible language. There were also a lot of books containing funny stories mostly about lawyers, politicians, and their egos. Rudi never forgot the psychological dimension of the law.

In his office at Hastings there was a remarkable amount of reprints and manuscripts sent to him by scholars from a wide variety of geographical as well as jurisprudential origins, from law and economics to gender theory, from African studies to history, both general and legal. In preparation for his funeral I was allowed to look through his address book to ascertain the names of some of his colleagues whom I should notify. I was amazed to discover the extent of his network. He maintained connections throughout the world so that his scholarship reflected the latest in legal changes.

In the Cornell Project on the Common Core of legal systems² all of this incredible theoretical and practical wealth came together to comprise a scholarly product whose quality after thirty years has not been matched by anyone else in the world. This project was immune from the common vices that modern comparative scholarship maintains. The variety of the legal systems compared in this project protected it from being Eurocentric. Unlike subsequent projects, Rudi's project was not limited to materials from the Western legal tradition.

2. R.B. SCHLESINGER, *FORMATION OF CONTRACTS* 2 Vols. (1967)

His analysis was precisely focused on one issue, the formation of contract. Consequently, there was no chance of losing the necessary attention to relevant details. This distinction makes the difference between a true comparative effort and a mere exposition of formal data from different foreign legal systems.

In looking to the future, as Rudi did in his last piece, the common core approach remains the solution for apparent tensions in modern jurisprudence. The legal discourse should be aimed at the understanding of the structure of the law, a complex domain in which both formalism and realism play a role but fall short from offering conclusive answers. Our understanding of the law is still too unsophisticated to allow us to brag about general theories contained in it. We need a lot of painstaking empirical observation (of a common core kind) before venturing into general explanations. Otherwise jurisprudence cannot go beyond infantile verbalism. Rudi may have offered to jurisprudence the key to proceed beyond the present ptolemic stage.